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NO.

in the

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1994

MANUEL JOSE RUIZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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602pp

QUESTIONS PRESENTED

WHETHER THE ELEVENTH CIRCUIT'S ANALYSIS OF THE COURT'S RELIANCE ON A VERSION OF THE SENTENCING GUIDELINES PROMULGATED AFTER THE TRIAL AS A BASIS FOR DENIAL OF A TWO-POINT ACCEPTANCE OF RESPONSIBILITY REDUCTION IN RUIZ' BASE OFFENSE LEVEL CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL, WHICH COURTS EXAMINE SUCH AN APPLICATION OF THE GUIDELINES IN AN EX POST FACTO CONTEXT BY ANALYZING THE DISTINCTIONS BETWEEN THE VERSIONS IN QUESTION, RATHER THAN BY ATTEMPTING TO RECONCILE THE VERSIONS IN LIGHT OF THE COURT'S PREVIOUS INTERPRETATION.

WHETHER THE ELEVENTH CIRCUIT'S FAILURE TO CONSIDER AND RULE APPROPRIATELY ON RUIZ' ARGUMENT THAT HE WAS DENIED DUE PROCESS OF LAW AS A RESULT OF THE IMPROPER JURY INSTRUCTION ON REASONABLE DOUBT CONFLICTS WITH DECISIONS OF THIS COURT.

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MANUEL JOSE RUIZ,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MANUEL JOSE RUIZ, defendant and appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, Eleventh Circuit, entered in this proceeding on July 29, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reproduced and attached hereto in the Appendix at pages App. 9 et seq., was entered on July 29, 1994. It is reported at 26 F.3d 1533.

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit was entered on July 29, 1994. Certain of the defendants/appellants filed petitions for rehearing; the court denied those petitions by its order dated October 18, 1994. Co-defendant/co-appellant FOWLER filed a motion for reconsideration of the petition for rehearing; the Court denied that motion on November 28, 1994. This petition for writ of certiorari was filed within ninety days after entry order denying the said petitions for rehearing and motions for reconsideration. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254 and Supreme Court Rule 10.1(c).

CONSTITUTIONAL PROVISIONS

Article II, Section 9, clause 3 provides:

No Bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor

shall any person be subject for the same offence to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SENTENCING GUIDELINES PROVISIONS

The 1989 version of Commentary 2 to §3E1.1, Federal Sentencing Guidelines is as follows:

Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his consti-tutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

The 1990 version of Commentary 2 to §3E1.1, Federal Sentencing Guidelines is as follows:

> This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional

challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

STATEMENT OF THE CASE and FACTS

STATEMENT OF FACTS

On March 7, 1990, Customs agent Lawrence Winberg was contacted by Honduran confidential informant Ellis McKenzie with regard to a narcotics deal "in the making" (R 16-559, 560). Thereafter, Agent Winberg worked in an undercover capacity, setting up the deal in accordance with his "operations plan" (R 17-886, 887). Several meetings were held in Miami, Florida, Pensacola, Florida and Point Clear, Alabama between certain of the defendants including Andy Schell, Joe Marino, Irving Schwartz and Daniel Deatherage, law enforcement officers based in Mobile, Alabama and working undercover, and confidential informants. As a result of those meetings and in accordance with Agent Winberg's operations plan, on April 18, 1990, packages that purported to be approximately 500 kilograms of cocaine were ordered by the U.S. Attorney from the Drug Enforcement Administration laboratory in Dallas, Texas. The packages and fifteen-odd armed agents awaited the defendants in a barn on a pecan farm in rural Baldwin County, Alabama (R 18-1043, 1044).

Twenty-four hours before the delivery was to take place, co-defendant Irving Schwartz told Agent Winberg that he thought two horse trailers were to be involved in the transport (R 17-892). U.S. Customs Service Agent James Tanner testified that the next day

at the Flying K Truck Stop, Mr. Schwartz told him that there would be two large trucks and a small car, the latter with a secret compartment that could carry sixty kilos (R 18-1019). From the rendezvous point at the Flying K, Agent Tanner and certain of the defendants were led by Agent Kyle Barnette to the warehouse (R 18-1023). Once there, first an International tractor-trailer, then a Kenworth truck, backed in. A Nissan station wagon was parked to the side of the International (R 18-1023).

A refrigerator truck that held the duffle bags containing narcotics was parked inside the barn, all the way to the side. Some of the agents tossed the duffle bags out on the ground behind the truck. Defendants Kelly Kalinowski and Sam DeGiso took out and counted the packages. Defendants Deatherage and your petitioner were in the vicinity. Agent Tanner testified that they were both writing something. Defendants Fernandez, Diaz, Rodriguez, and Pastor were tending to their respective trucks. According to Agent Tanner, the International truck was being loaded with duffle bags, and some packages were allocated to the Kenworth (R 18-1094, 95). After one truck was loaded and during the loading of the other truck, Ruiz and those other defendants present at the barn were arrested.

At trial, testimony was taken regarding Ruiz's presence at the barn and absence from any meetings, conversations, or negotiations prior to April 18, 1990. (R 18-1008, 1009; 18-1297). There was testimony that latent fingerprints lifted from the Nissan matched Ruiz's. (R 19-1424, 1425). U.S. Customs Service Agent Keith Barnette had prepared a report that contained no reference to Ruiz. He testified at trial that Ruiz told others at the barn to ensure a correct count (R 18-1169, 1169; 19-1207). At that time, Agent Barnette was under indictment by the State of Alabama for murder by vehicle, which offense carried a penalty of life

imprisonment; additionally, a civil suit had been brought by the victim's estate, and Barnette had the option of being represented by the United States Attorney's Office. (R 18-1154-1157; 20-1567,73, 20-1588-95).

Co-defendant Schell testified for the Government. He and his brother, Larry Feder, had been involved in the deal since its inception; no testimony was elicited from him regarding any involvement in any negotiations, meetings, or conversations in the deal (R-15 & 16-203-541). He did testify, however, that he had met Ruiz in May or June of 1988 at a meeting at which Schwartz and Marino were also present. Although Schell spoke no Spanish and testified that Ruiz spoke only Spanish, Schell purported to know the substance of Ruiz's conversation with one René. (R 15-230, 16-481). The court declined defense counsels' request to apprise the jury of Schell's first experience with the criminal justice system in the late 1970's, wherein he was given immunity for his testimony in a drug rip-off murder. (R 16-484-490, 557).

STATEMENT OF THE CASE

Ruiz and the others were indicted on April 19, 1990, the day after the arrests were effected (R 1-2). All the men who were arrested in Alabama were detained from the time of their arrests.

The matter was brought to jury trial on September 19, 1990. The trial court ruled on James motions, finding that there was a conspiracy in existence as alleged in both counts one and three, that the statements were made in furtherance of the conspiracy and during the course of the conspiracy (R 21-1978,79).

At the charge conference Ruiz moved for a mistrial on the grounds that the Government

improperly stated the burden of proof. The motion was denied. (R 21-2088). During closing argument, the prosecutor stated:

> [T]he first thing I wanted to comment on is this chart which has been referred to by many of the defense lawyers. And you see, he stops right here at beyond reasonable doubt. This is the last piece that is on this chart. The last level of proof. I submit to you that after you hear the judge's charge, you will understand that this chart is like a glass that is half full of water. There is nothing up here at the other half.... The government's burden of proof is simply to convince you beyond a reasonable doubt based on reason and common sense after an objective consideration of the evidence in the case.

(R 21-2051-2052). [emphasis added].

A motion for mistrial was made on the grounds that he prosecutor improperly stated the burden of proof. The court denied the motion. (R 21-2088). The court instructed the jury as follows:

> While the Government's burden of proof is a strict or heavy burden, it is not necessary that a defendant's guilt be proved beyond all possible doubt. It's only required that the Government's proof exclude a reasonable doubt concerning the defendant's guilt. (R 21-2095). [emphasis added].

The jury twice indicated it was deadlocked, and the court gave a modified *Allen* charge over objection. (R 22-2125-2126). The jury returned its verdict on October 5, 1990. The jury returned a guilty verdict on counts one, three, and five.

On December 19, 1990, at the sentencing hearing, the court relied on post-conviction amendments to the Application Notes of the Sentencing Guidelines to deny Ruiz the two-point acceptance of responsibility reduction that had been recommended in this presentence investigation report. (R 22 2193-2198).

ARGUMENT FOR ALLOWANCE OF THE WRIT

WHETHER THE ELEVENTH CIRCUIT'S ANALYSIS OF THE COURT'S RELIANCE ON A VERSION OF THE SENTENCING GUIDELINES PROMULGATED AFTER THE TRIAL AS A BASIS FOR DENIAL OF A TWO-POINT ACCEPTANCE OF RESPONSIBILITY REDUCTION IN RUIZ' BASE OFFENSE LEVEL CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL, THAT EXAMINE AN EX POST FACTO APPLICATION OF THE GUIDELINES BY ANALYZING THE DISTINCTIONS BETWEEN THE VERSIONS IN QUESTION, RATHER THAN BY ATTEMPTING TO RECONCILE THE VERSIONS IN LIGHT OF THE COURT'S PREVIOUS INTERPRETATION.

The opinion of the Eleventh Circuit states that ex post facto problems may occur where application of the Sentencing Guidelines and commentary in effect on the date of sentencing would result in a harsher sentence than under application of the version in effect at the time of the commission of the offense, *United States v. Wilson,* 993 F.2d 214, 216 (11th Cir. 1993) and that Guideline commentary is authoritative unless its interpretation violates the law or is an erroneous reading of the Guidelines. *Stinson v. United States*, --- U.S. ---, ---, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993). The court in the

instant case found there was no ex post facto violation because the amendment in question, the 1990 alteration of §3E1.1 comment. n. 2 pertaining to acceptance of responsibility, confirmed the district court's previous reading of the section in question, rather than overruling the court's prior construction. That the court's construction was in line with the amendment is not a basis for finding the amendment to be one of clarification rather than one of substantive, and substantial, change. That the district court may have applied the 1989 version of §3E1.1 in a manner consistent with the 1990 version begs the question.

The district court posed the matter as one of congruity *vel non* with the court's interpretation of the guideline and the amendment thereto. The task that should have been undertaken by the court, however, was an initial examination of the facts within the framework of the principles underlying the Ex Post Facto Clause, and then an analysis of whether the amendment merely clarifies, rather than effects a substantive change. *See United States v. Gerber*, 24 F.3d 93 (10th Cir. 1994). The *Gerber* court took its guidance from *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987): "[F]irst, did the sentencing court apply the guidelines to "events occurring before its enactment," and second, did that guideline "disadvantage the offender affected by it." (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981)."

Ruiz's presentence investigation report expressly relied on the revised commentary to §3E1.1 as the foundation for approving a two point adjustment for acceptance of responsibility, based on a letter submitted by Ruiz submitted to the court approximately two months prior to the imposition of his sentence, on October 24, 1990. At that time, the Commentary to §3E1.1 read:

2. Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

Effective November 1, 1990 the commentary was amended to delete the above paragraph and replace it with the following:

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pretrial statements and conduct.

That the first prong of the *Miller* analysis is extant is not in dispute. The events to which the guideline portion is to be applied are not those that constituted the offense conduct, which occurred well before the application of the amendment in any case, but rather the submission of the letter of contrition, upon which the probation officer relied, the date of which was October 24, 1990.

Neither is the second prong a matter for dispute. Had the court travelled under the 1989 version of §3E1.1 Commentary 2, Ruiz would have enjoyed the court's consideration of the two point downward offense level adjustment to which the probation officer had originally determined he was entitled pursuant to that version. That the amendment had a detrimental effect is apparent when one reviews the court's paraphrase of the amended guidelines:

> Section 3E1.1, dealing with acceptance of responsibility application note two says that the adjustment is not intended to apply to the defendant that [sic] puts the government to its burden of proof at trial by denying the essential factual elements of guilt, was convicted, and only then admits guilt and expresses remorse. And further that in each instance a determination that the defendant has accepted responsibility would be based primarily upon pretrial statements and conduct. I find that none of those factors relate to this defendant [sic] belated effort to accept responsibility and for the reasons stated deny the adjustment for accepted responsibility.

(R 22-2197-98); U.S.S.G. §3E1.1 comment.n.2. (Nov. 1990).

The *Miller* analysis having been applied and found to fit, the clarification-substantive change examination is made. The amendment is designated to

be one of clarification, but appellate courts have been quick to find that the Sentencing Commission's designation is not granite-etched. *See United States v. Prezioso*, 989 F.2d 52 (1st Cir. 1993); *United States v. Johns*, 5 F.3d 1267 (9th Cir. 1993); *United States v. Gerber*, 24 F.3d 93 (10th Cir. 1994). If one visualizes the 1989 and 1990 versions of §3E1.1 comment. n.2 as images on undeveloped film, the darkroom that is the courtroom should recognize the features in their proper perspective. Comparison between the two versions, would be to compare the negative to the developed photograph. In one frame a defendant is not precluded from the adjustment because he or she went to trial. In the other, the reverse is true: one is precluded except in rare situations. One requires sincere contrition; the other places temporal limits on which contrition, whether or not sincere, is considered to be a factor. In 1989 one may, but...; whereas in 1990 one may not, except.

The error committed is that the district and appellate courts interpretated the amendment in light of their prior construction of it, rather than examining whether the amendment differs materially from the preceding version, such that the application of the more recent amendment works to the detriment of the defendant. In other words, that the more recent amendment may express more succinctly the court's preferred interpretation does not discharge the court from the duty of examining, not how the court would have construed the language had it held the Commission's pen, but whether and how that language impacts the defendant in either application. If there is an impact, it is improper to decline to critically analyze the amendment in deference to the Commission's label of an amendment as one of clarification.

It is fundamental that in any event an examination of the nature of the amendment must be made. While the appellate court examines previous

instances wherein it has surveyed §3E1.1, it has not done so in the framework of considering the nature and degree of commentary revisions. Both *United States v. Castillo-Valencia*, 917 F.2d 494 (11th Cir. 1990), *cert. denied* 499 U.S. 925, 111 S.Ct. 1321, 113 L.Ed.2d 253 (1991) and *United States v. Rodriguez*, 959 F.2d 193 (11th Cir.), *cert. denied*, --- U.S. ---, 113 S.Ct. 649, 121 L.Ed.2d 563 (1992) treat the matter of application of §3E1.1 where the defendant elects to go to trial. Neither examines the differences in application of the section or commentary within the ex post fact context; accordingly, any similarity between those cases and the instant case is superficial and devoid of authority.

The Tenth Circuit in *Gerber, infra*, illustrated the analysis that should have been applied. Using a plain error standard of review in the context of qualification for a substantial assistance departure, the court explored whether the ex post facto clause was violated where, at the time of the commission of the offense, the guidelines view was whether the defendant had made a good faith effort to provide substantial assistance, while at sentencing, the approach was whether the defendant has provided substantial assistance. The appellate court found that the amendment made a substantive change in the standard that preconditioned a substantial assistance departure.

The Tenth Circuit could have opined, in a manner parallel to the Eleventh Circuit, that it had always intended for the good faith effort to have been a fruitful one, akin to the Eleventh Circuit's interpretation of sincere contrition being pre-plea, non-trial contrition. The Tenth Circuit recognized, however, that preconditioning the departure on performance was a material alteration that adversely impacted the defendant, as was the Eleventh Circuit's retroactive post-trial precondition of extracting Ruiz's right to proceed to trial. The 'rare instance' language

of the amendment to the commentary drastically altered the standard to be applied to an acceptance of responsibility adjustment, such that the court declined to award to him that which he had previously been allotted.

The Ninth Circuit in *Johns*, *infra*, held that although an amendment was characterized as clarifying by the Sentencing Commission, the fact that it enacted a prohibition that had not existed before trumped that characterization. In a like manner, the 1990 amendment is 'not intended' to apply to those who, in 1989 were sincerely contrite and 'not precluded'. The 1990 version is tantamount to a prohibition to trial, and those sentenced under it are appropriately advised of the trade-off expected for their adjustment. *See Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 965 ("Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the *lack of notice* and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.")(emphasis added). Two principles underlying the ex post facto clause are "to restrain legislatures and courts from arbitrary and vindictive action and *to prevent prosecution and punishment without fair warning. Rubino v. Lynaugh*, 845 F.2d 1266, 1272 (5th Cir. 1988)(emphasis added).

Because the ex post facto analysis of the Eleventh Circuit focuses on reconciling interpretations of successive versions of the Sentencing Guidelines, rather than on examining the substantive and procedural impact of amendments that purport to only clarify a previous version, the analysis employed by the Eleventh Circuit, as opposed to that used by the First, Fifth, Ninth and Tenth Circuits, cannot identify instances where violations of the ex post facto clause have occurred. The analysis accorded to Ruiz's argument deprived him of the protection of that clause.

WHETHER THE ELEVENTH CIRCUIT'S FAILURE TO PROPERLY CONSIDER AND RULE ON RUIZ'S ARGUMENT THAT HE WAS DENIED DUE PROCESS OF LAW AS A RESULT OF THE IMPROPER JURY INSTRUCTION ON REASONABLE DOUBT CONFLICTS WITH DECISIONS OF THIS COURT.

The reasonable doubt standard in criminal matters is guaranteed by the Due Process Clause. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "The reasonable doubt standard guards against conviction of the innocent by ensuring the *systemic* accuracy of the criminal system. *Sullivan v. Louisiana* -- U.S. --, 113 S.Ct. 2078, 2083, 124 L.Ed.2d 182 (1993). (a jury verdict of guilt beyond a reasonable doubt is "a 'basic protection' whose precise effects are unmeasurable"). An erroneous reasonable doubt instruction invalidates the jury verdict, making it impossible to assess the accuracy of a conviction a conviction because "[t]here is no object, so to speak, upon which harmless error can operate." *Sullivan* at ---, 113 S.Ct. at 2082. *Nutter v. White*, 39 F.3d 1154 (11th Cir. 1994). After the prosecutor likened reasonable doubt to a half-full glass, the court instructed the jury that "it's only required that the government's proof exclude a reasonable doubt...." At the charge conference, Ruiz had objected to this instruction on the bases that such an instruction misleads the jury and lessens their belief of what the standard of reasonable doubt should be.

The district court's reasonable doubt definition is not fatally flawed; in fact, it tracks pattern instructions that have passed muster. The defect is rather the instruction pertaining to the burden the government must meet. Prior to informing the jury what reasonable doubt is, the court enervated the strength of the definition by relaxing the duty of what

must be done with it. The word 'only' does not convey duty or obligation on the part of the government; its synonyms are 'just', 'merely' and 'simply'.

"[A]n inadequate reasonable doubt instruction cannot be cured by other circumstances at trial.... an improper reasonable doubt instruction undermines the fundamental fairness of every trial in which is it used." *Nutter v. White, id,* at 1158, *cf. Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). By the same token, an adequate reasonable doubt instruction cannot cure an instruction by the court that directs application of that standard in such a manner as to alter the burden of proof. The district court's instruction eased the government's burden, but not only were there no circumstances to alleviate the harm, the damage was exacerbated by the prosecutor's closing argument reference to the half-full glass.

The practical effect of the instruction pertaining to the government's burden with regard to the reasonable doubt instruction was to eviscerate the reasonable doubt standard to just such an effect as if the instruction were internally deficient. The facts in the instant case present a situation such as that in *Sullivan, id*, where the consequence is that there has been "no judicial determination".

CONCLUSION

For the foregoing reasons, Petitioner MANUEL JOSE RUIZ respectfully prays that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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By: _____
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Dated this 22nd day of February, 1995.

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[FILED APRIL 19, 1990]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

CRIMINAL NO. 90-00052
USAO No. 90R0145

UNITED STATES OF AMERICA

v.

JOSEPH THOMAS MARINO; IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF; DANIEL LEE DEATHERAGE; OSCAR DIAZ; RAMON RODRIGUEZ, JR.; MANUEL JOSE RUIZ; AL PASTOR; SAMUEL J. DEGISO; KELLY FRED KALINOWSKI; ROBERT LINCOLN FOWLER; JESUS MANUEL FERNANDEZ;

Defendants.

INDICTMENT

The Grand Jury charges:

COUNT ONE

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRIGUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, did wilfully, knowingly,

and unlawfully combine, conspire, confederate, and agree together with each other, and with divers other persons whose names are to the Grand Jury known and unknown, to commit certain offenses against the United States of America, to wit:

> To knowingly and intentionally unlawfully distribute and possess with intent to distribute approximately 1,000 kilograms of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

It was part of said conspiracy that the defendants would themselves or through other persons at known and unknown times and places obtain, package, and distribute cocaine for sale; and that the aforenamed defendants themselves or through divers other persons would engage in negotiations about price for the cocaine with prospective purchasers for same, and would deliver he cocaine to places necessary for such transactions; all in violation of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 2.

COUNT TWO

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRI-GUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, did wilfully, knowingly, and unlawfully attempt to commit an offense against the United States, to wit:

> To knowingly and intentionally import approximately 1,000 kilograms of cocaine, a

Schedule II controlled substance, into the United States of America from Honduras, a place outside the United States of America, in violation of Title 21, United States Code, Section 952(a).

All in violation of Title 21, United States Code, Section 846 , and Title 18, United States Code, Section 2.

COUNT THREE

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRIGUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, did wilfully, and knowingly, combine, conspire, confederate and agree with other persons whose names are to the Grand Jury known and unknown, to commit certain offenses against the United States, to wit:

To knowingly and intentionally import approximately 1,000 kilograms of cocaine, a Schedule II controlled substance, into the United States of America from Honduras, a place outside the United States of America, in violation of Title 21, United States Code, Section 952(a).

It was a part of the conspiracy that the defendants would themselves or through other persons contact certain individuals to obtain a source of supply for cocaine; that the defendants would themselves or through others contract with certain individuals to arrange for the

transportation of the cocaine from Honduras to the United States; that the defendants would themselves or through others meet with certain individuals to take delivery of the cocaine upon its arrival in the United States at a location upon which they had previously agreed; that the defendants would themselves or through others provide vehicles and personnel to take delivery of he cocaine; that the defendants would themselves or through others provide money to pay for he transportation of he cocaine from Honduras to the United States where the vehicles and personnel would then take delivery of he cocaine; all in violation of Title 21, United States Code, Section 963, and Title 18, United States Code, Section 2.

COUNT FOUR

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRIGUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, did wilfully, knowingly, and unlawfully, attempt to commit an offense against he United States, to wit:

> To knowingly and intentionally possess with intent to distribute approximately 1,000 kilograms of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).
>
> All in violation of Title 21, United States Code,

Section 846, and Title 18, United States Code, Section 2.

COUNT FIVE

From in or about March, 1990, and continuing hereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, JOSEPH THOMAS MARINO, IRVING SCHWARTZ, aka GUS, aka WILLIAM HUFF, DANIEL LEE DEATHERAGE, OSCAR DIAZ, RAMON RODRIGUEZ, JR., MANUEL JOSE RUIZ, AL PASTOR, SAMUEL J. DEGISO, KELLY FRED KALINOWSKI, ROBERT LINCOLN FOWLER, and JESUS MANUEL FERNANDEZ, knowingly and intentionally did unlawfully distribute and possess with intent to distribute approximately 500 kilograms of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL

/S/ REBECCA E. HAYES
FOREMAN, UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

---------- - APRIL 1990
J.B. SESSIONS, III
UNITED STATES ATTORNEY

[FILED DECEMBER 20, 1990]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number Cr. 90-00052

UNITED STATES OF AMERICA

v.

MANUEL JOSE RUIZ

JOHN THORNTON
Defendant's Attorney

THE DEFENDANT:

was found guilty on count(s) 1, 3 & 5 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. 846	Conspiracy to distribute & possess with intent to distribute Schedule II controlled substance (cocaine)		1
21 U.S.C. 963	Conspiracy to import a schedule II controlled substance (cocaine)		3

21 U.S.C. 841(a)(1)	Distribute & possess with intent to distribute Schedule II controlled substance (cocaine)	5

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $150.00, for count(s) 1, 3 & 5, which shall be due immediately.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No: 266-31-4565

Defendant's Date of Birth: December 6, 1957

Defendant's Mailing Address: In Custody

Defendant's Residence Address:

Date of Imposition of Sentence December 19, 1990

Signature of Judicial Officer /s/

Name & Title of Judicial Officer Charles R. Butler, Jr.
UNITED STATES DISTRICT JUDGE
Date DECEMBER 20, 1990

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE HUNDRED SIXTY (360) MONTHS WITHOUT PAROLE

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall not possess a firearm or destructive device.

Special conditions of the defendant's supervised release term are:

1.) That he not illegally possess any controlled substances.

2.) That he participate in a Drug Aftercare Program as & when directed to do so by the U.S. Probation Office.

FINE

The defendant shall pay a fine of $0.00. The fine includes any costs of incarceration and/or supervision.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Manuel Jose RUIZ,
Defendant-Appellant.

No. 90-7890.

United States Court of Appeals,
Eleventh Circuit

July 29, 1994.

Thirteen defendants were convicted in the United States District Court for the Southern District of Alabama, No. CR90-00052, Charles R. Butler, Jr., J., of offenses arising out of their participation in cocaine importation and distribution conspiracy, and they appealed. The Court of Appeals, Johnson, Senior Circuit Judge, held that: (1) limitation of defendants' cross-examination of customs agent did not violate confrontation clause; (2) limitation of defendants' introduction of government informant's deposition did not violate confrontation clause; (3) prosecutor's questions regarding statement of white defendant regarding black man did not warrant mistrial; (4) prosecutor's proffered reason for exercising peremptory strike against black venireperson was race-neutral; (5) any

error in admitting first defendant's statement to customs agents was harmless; (6) denial of reduction in second defendant's sentence for acceptance of responsibility did not violate ex post facto clause; and (7) sentence of life imprisonment for third defendant did not violate Eighth Amendment.

Affirmed.

1. Criminal Law -662.7
Witnesses-350

District court did not violate confrontation clause or abuse its discretion by prohibiting cross-examination of customs agent regarding his state arrest for vehicular homicide and internal affairs investigation and civil action arising from that incident, notwithstanding defendants' contention that incident gave agent motive to testify favorably for government; agent's testimony was consistent with statement given prior to both creation of his notes and his arrest, incident was highly prejudicial, there was no evidence that government had ability to grant leniency in state actions against him, and defendants were allowed to delve into agent's credibility by inquiring if he had any reason to "curry favor" with government. U.S.C.A. Const. Amend. 6.

2. Criminal Law - 661

District court possesses discretionary power to rule on admissibility of evidence.

3. Criminal Law - 662.7

District court's discretion in limiting scope of cross-examination is subject to requirements of Sixth Amendment. U.S.C.A. Const.Amend. 6.

4. Criminal Law - 662.7

Defendant's right to cross-examine is not unlimited as once there is sufficient cross-examination to satisfy confrontation clause, further questioning is within district court's discretion. U.S.C.A. Const.Amend. 6

5. Witnesses - 372(1)

Mere fact that defendants seek to explore bias on part of prosecution witness does not automatically void court's ability to limit cross-examination. U.S.C.A. Const.Amend. 6.

6. Criminal Law - 627.2

District court could limit introduction of deposition of government informant, whom government declined to call as witness, prohibiting introduction of portions relating to informant's detention for possession of crack cocaine, notwithstanding defendants' contention that deposition demonstrated that customs agent lied in stating that he did not intervene in detention and showed that informant might be biased in favor of government' defendants were allowed to introduce portions of deposition deemed relevant for impeachment purposes, including informant's admission that he was paid government informant, and there were no significant inconsistencies between agent's and informant's descriptions of crack cocaine incident.

7. Criminal Law - 662.30

District court's refusal to allow defendants' to introduce entire deposition of government informant, whom government did not call as witness, including portions relating to his detention for possession of crack cocaine, did not violate confrontation clause; informant was not "vital witness," informant admitted that he was

government informant, that he had been paid in past, that he received $12,000 in instant case, that he received $2,000 the day before his deposition, and that he spent time preparing for deposition with customs agents, and jury was aware that informant stood to receive $250,000, representing maximum award allowed to informants, and that whether he received that amount would be determined by superiors of customs agents involved in case. U.S.C.A. Const.Amend. 6.

8. Criminal Law - 662.7

Sixth Amendment is satisfied where sufficient information is elicited to allow jury to gauge adequately witness' credibility and to assess his motives or possible bias. U.S.C.A. Const.Amend. 6.

9. Criminal Law - 706(3)

Prosecutor's questions regarding white defendant's statement, using racial epithet, that only way to control black man was to beat him with a bat did not warrant mistrial; prosecutor immediately moved on to other points, and defendants declined court's offer to give curative instruction.

10. Criminal Law - 1158(3)

Court of Appeals gives great deference to district court's finding that government rebutted prima facie case of discriminatory jury selection and reverse only if that finding is clearly erroneous.

11. Jury - 33(5.15)

Prosecutor's belief that black venireperson may have been related to defendant in earlier case she prosecuted did not justify peremptory challenge of that

venireperson; record suggested that venireperson was unrelated to that defendant as venireperson did not affirmatively respond to court's inquiry to venire as to whether any family member had ever been involved in criminal matter in court.

12. Jury - 33(5.15)

Venireperson's inability to pay attention is proper race-neutral reason for using peremptory strike.

13. Jury - 33(5.15)

To allow meaningful appellate review of claim of discriminatory use of peremptory strike when strike is based on venireperson's demeanor, trial courts should fully develop record regarding specific behavior of venireperson that leads to peremptory strike and should verify that stricken venireperson's conduct was conspicuously different from that of other venirepersons.

14. Jury - 33(5.15)

Prosecutor's explanation for exercising peremptory strike against black venireperson was race-neutral; prosecutor stated that venireperson was generally inattentive during voir dire, directing her attention toward defendants and away from prosecution, and defendants did not dispute that behavior.

15. Criminal Law - 1169.12

Taking of defendant's statement in contravention of *Miranda* is subject to harmless error analysis; court examines effect erroneously admitted statement had upon other evidence introduced at trial and upon conduct of defense and, if, absent statement, remaining evidence is so overwhelming as to establish guilt beyond reasonable

doubt, admission of statement is harmless.

16. Criminal Law - 1169.12

Any error in admitting defendant's statement, which was made after alleged invocation of his *Miranda* rights, was harmless error, given overwhelming strength of evidence against defendant on drug conspiracy charges; customs agent testified that codefendant told him that automobile with secret compartment would be used to load and transport cocaine, government introduced photographs showing automobile's secret compartment, customs agents testified that defendant was present at drug transaction and spent much time under automobile and that they overheard defendant telling codefendant that he needed tools and flashlight to open compartment, and customs agent testified that defendant told him that compartment held 60 kilograms of cocaine.

17. Criminal Law - 1239

Sentencing Guidelines commentary is authoritative unless its interpretation violates law or is erroneous reading of guidelines. U.S.S.G. §1B1.1 et seq., 18 U.S.C.A.App.

18. Constitutional Law - 203

Criminal Law - 1233

Where amendments to Sentencing Guidelines commentary do not overrule prior construction, but, rather, serve to confirm Court of Appeals' reading of guideline section, ex post facto concerns are not implicated. U.S.S.G. §1B1.1 et seq., 18 U.S.C.A.App; U.S.C.A. Const. Art 1 §9, cl. 3.

19. Criminal Law - 1139

District court's application of Sentencing Guidelines is subject to de novo review. U.S.S.G. §1B1.1 et seq., 18 U.S.C.A.App.

20. Constitutional Law - 203

Criminal Law - 1252

Denial of reduction in defendant's sentence for acceptance of responsibility, based on amendment to commentary regarding reduction when defendant exercised right to trial, did not violate ex post facto clause; commentary did not overrule prior construction, but, rather, accorded with Court of Appeals' prior reading of section. U.S.S.G. §3E1.1, comment. (n.2.), 18 U.S.C.A.App; U.S.C.A. Const. Art. 1, §9, cl. 3.

21. Criminal Law - 1213.8(3, 6)

Life sentence imposed on defendant convicted on charges arising from cocaine distribution conspiracy did not violate Eighth Amendment, notwithstanding contention that district court mechanically applied guidelines and did not appreciate that defendant did not possess intent or ability to distribute cocaine and that he could not have distributed it as it was government owned and controlled; court sentenced defendant and each of his 12 codefendant individually, and record supported amount of drugs attributed to defendant. U.S.C.A. Const.Amend. 8.

J.B. Sessions, U.S. Atty., Gloria Bedwell, Mobile, AL, for U.S.

Bill Clay, N. Bay Village, FL, Lawrence E. Besser, Miami, FL for Diaz.

John Thornton, Jr., Thorton, Rothman & Emas, Miami, FL, Joel Hirschhorn, Coral Gables, FL, for Ruiz.

Domingo Soto, Mobile, AL, for Fernandez.

Richard R. Williams, Mobile, AL, for Pastor.

Leonard Rosenberg, Miami, FL, for Allen.

Gregory S. Reese, Mobile, Al, for Woods.

John Furman, Mobile, AL for Kalinowski.

Joaquin Perez, Miami, FL, for Rodriguez.

John R. Howes, Ft. Lauderdale, FL, for Marino.

James W. May, Foley, AL, for Degiso.

Robert Levitt, Atlanta, GA, for Swartz.

Alan E. Weinstein, Miami Beach, FL, for Deatherage.

David Garber and Jana V. Jay, Naples, FL, for Fowler.

Appeal from the United States District Court for the Southern District of Alabama.

Before EDMONDSON, Circuit Judge, JOHNSON, Senior Circuit Judge, and PITTMAN*, Senior District Judge.

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* Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

JOHNSON, Senior District Judge:

Defendant-appellant Oscar Diaz and twelve co-defendants ("Appellants") [1] appeal various aspects of their convictions and sentences arising out of their participation in a cocaine importation and distribution conspiracy. After due consideration, we affirm Appellants' convictions sentences.

I. STATEMENT OF THE CASE

A. *Background Facts*

1. The drug deal

On March 7, 1990, informant Ellis McKenzie informed Customs Agent Lawrence Winberg that appellant Billy Allen and others were involved with narcotics. McKenzie gave Agent Winberg Allen's telephone number. Winberg then contacted Allen, identifying himself as a Colombian drug dealer. As a result of these conversations and ensuing negotiations, Winberg and other undercover agents went to Miami, Florida to meed with Allen and some of his fellow conspirators.

On March 25, 1990, Agent Winberg, Agent James Tanner, and McKenzie met with Allen and appellant Dudson Woods at the Sofitel Hotel to discuss their cocaine deal. Agent Tanner testified that he overheard a conversation between Allen and McKenzie in which Allen

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[1] The other appellants are Jose Manuel Ruiz (sic), Jesus Manuel Fernandez, Al Pastor, Billy Allen, Dudson Woods, Daniel Lee Deatherage, Kelly Fred Kalinowski, Irwin Schwartz, Ramon Rodriguez, Jr., Robert Lincoln Fowler, Joseph Thomas Marino, and Samuel J. Degiso.

mentioned a previous cocaine trip to Honduras and stated how rich they would become at the conclusion of the drug transaction. The next day Allen introduced Agent Tanner and Agent Kyle Barnette to appellant Joseph Marino. Later that day, Winberg, Barnette, and Tanner met with Fabio deChristofaro and appellants Samuel DeGiso, Irving Schwartz, Allen, Woods, and Marino. At this meeting, videotaped by the government, Schwartz told Winberg that he could transport the cocaine using a specially prepared airplane. Agent Winberg stated that he would supply his own transportation, whereupon Schwartz offered to buy 1,000 kilograms of cocaine for $10,000--$12,000 per kilogram. They agreed that Schwartz would pay $250,000 "earnest money" in the United States.

At a videotaped meeting on March 27, 1990, attended by Winberg, Tanner, Barnette, McKenzie, Schwartz, Marino, Andy Schell, and Larry Feder, Schwartz stated that he wanted a long-term deal. Following the meeting, surveillance units photographed Marino, Schwartz, Feder, and Schell talking in the parking lot. These units later photographed Marino meeting with appellant Dan Deatherage. Winberg subsequently informed Allen and Woods about the meeting and told them that he would go to Honduras to work out the deal in early April.

In early April of 1990, Agents Winberg and Barnette met Schwartz at a Hilton Hotel in Pensacola, Florida to discuss the logistics of the cocaine deal. Schwartz told them that : (1) the cocaine would be sold in the Northeast; (2) he had a good organization; and (3) his people were "prepared to die." Subsequently, it was arranged for Agent Winberg to meet with Schwartz and Marino in Mobile, Alabama to receive the $250,000 earnest money. The parties agreed that Schwartz or Marino would remain with Winberg until payment of the balance on the cocaine.

On April 10, 1990, the Customs Service in New Orleans, Louisiana detained McKenzie as he tried to enter the United States from Honduras. Customs agents stopped McKenzie because he had crack cocaine on his person. Winberg went to New Orleans and met with McKenzie, who was released.

On April 14, 1990, Marino called Winberg to tell him he was at a hotel in Baldwin County, Alabama. Two days later, Winberg and Barnette met with Schwartz at the hotel to receive the earnest money. Feder, Marino, and Deatherage were also present.

On April 17, Agents Winberg, Barnette, and Mike Ciaurro met Schwartz to discuss delivering the cocaine in Baldwin County, Alabama. Because Schwartz told the agents that he wanted to see the cocaine, Winberg and Ciaurro
accompanied Deatherage to view the cocaine.[2] When shown the cocaine, Deatherage snorted some. The delivery was then set for the next day.

In the morning of April 18. 1990, Marino met with Agents Winberg, Barnette and Ciaurro, telling them that Schwartz and Deatherage had gone to meet the drivers. Barnette then left to prepare the delivery site. Marino also told the agents that (1) he, Schwartz, Schell, and Feder put up the money for the cocaine and (2) that Mannie (appellant Jose Manuel Ruiz[sic]) was in charge of transportation. Marino then offered to stay in Alabama until the balance of the money was paid.

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[2] The cocaine was not actually from Honduras but was instead from the government's supply of previously confiscated cocaine.

As arranged, Schwartz, Deatherage, and Agents Barnette and Tanner rendezvoused with the drivers. At the rendezvous site, Schwartz told the agents that he would be using two trucks and a Nissan automobile to transport the drugs--each truck would hold 250 kilograms with the Nissan carrying sixty kilograms in a secret compartment. Schwartz introduced appellants Deatherage and Kelly Kalinowski as "his guys." He then instructed everybody to go to the loading site, a barn in Baldwin County, while he returned to the hotel. At the loading site, agent Keith Barnette observed appellants Oscar Diaz and Jesus Fernandez working as part of Schwartz's loading and transportation crew. Diaz told Keith Barnette that the cocaine would be hidden in the truck's sleeper compartment. As the cocaine was being loaded, several agents[3] observed Deatherage and Ruiz counting the bags. Agent Tanner overheard Ruiz telling Deatherage to verify the count because any shortfall would come out of their pockets. Assisting in the unloading were appellants Degiso, Kalinowski, Fernandez, Ramon Rodriguez, and Al Pastor. Agents observed Diaz loading the sleeper compartment and overheard a conversation between him and Rodriguez in which each thought that the other had been counting. Ruiz was then heard telling them that they were partners and had better get it straight. Diaz then began using a calculator.

Meanwhile, appellant Robert Fowler asked one of the agents if he could cover the floor because he was going to open the Nissan's secret compartment beneath the vehicle and did not want to get dirty. As Fowler got under the Nissan, he told agents that it would hold sixty kilograms. Fowler also told agents that he did not know

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[3] A number of agents were in the barn, pretending to be part of Winberg's Colombian drug gang.

how to open the compartment because he had never before used it. Fowler asked for various tools, but Fernandez told him that none were available.

Once the cocaine was loaded, the men were arrested. Schwartz and Marino were arrested at their hotel. Woods and Allen were arrested in Miami on April 22, 1990. In a post-arrest statement, Woods admitted working for Feder and telling Feder that he could obtain cocaine from McKenzie.

2. Schell's testimony

Andy Schell testified for the government. He identified "Mannie" as appellant Manuel Ruiz and admitted being involved in the drug business with Schwartz, Marino, and Ruiz. Schell testified that after meeting Schwartz and Marino, he began buying cocaine from Schwartz, Marino, and Deatherage and that Feder later became involved. Schell also testified that, at Schwartz's request, he raised $70,000 for the deal with Agent Winberg. Schell identified Deatherage, Woods, and Allen as Schwartz's partners.

B. *Procedural History*

On April 19, 1990, Marino, Schwartz, Deatherage, Degiso, Ruiz, Diaz, Rodriguez, Pastor, Kalinowski, Fowler, and Fernandez were indicted in a five-count indictment charging them with (I) conspiracy to possess with intent to distribute cocaine, (II) attempt to import cocaine, (III) conspiracy to import cocaine, (IV) attempt to possess cocaine with intent to distribute, and (V) possession of cocaine with intent to distribute. A separate but identical indictment was issued against Allen and Woods. The two cases were then consolidated.

The trial began September 19, 1990 and lasted approximately two and one-half weeks. During the trial,

the court granted judgment of acquittal motions in favor of Diaz, Fernandez, Pastor, Kalinowski, Rodriguez, and Fowler on Counts II and III. Following the giving of an *Allen* charge, Marino, Schwartz, Degiso, Allen, Deatherage, Woods, and Ruiz were convicted of Counts I, III, and V and found not guilty on Counts II and IV. In addition, Diaz, Fernandez, Pastor, Kalinowski, Rodriguez, and Fowler were convicted on Count V and acquitted on Counts I and IV. Appellants were sentenced to lengthy prison terms.

II. ANALYSIS

Among them, Appellants raise multiple issues concerning alleged errors at trial and sentencing.[4] We address below only those issues having merit, specifically whether: (1) the district court abused its discretion in restricting cross-examination of Agent Keith Barnette or informant McKenzie; (2) the prosecutor impermissibly injected race into the trial; (3) the prosecutor struck a venireperson based on race; (4) the court erred in admitting post-arrest statements of Fowler; and (5) Appellants' sentences violate either the ex Post Facto Clause or the Eighth Amendment.[5]

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[4] We note that not all Appellants join in each claim. Nonetheless for the sake of convenience, we will refer to Appellants when discussing each claim.

[5] Having carefully studied the record, we find that *all* other issues raised by Appellants are without merit. Accordingly, further discussion is not warranted with regard to Appellants' claims concerning (1) various acts of alleged prosecutorial misconduct, (2) suppression motions, (3) the completeness of the trial transcript, (4) double jeopardy, (5) peremptory challenges, (6) the admission of Deatherage's other crimes and certain statements made by Marino, (7) the *Allen* charge, (8) violations of the Jencks Act, (9) the sufficiency of the evidence, and (10) Winberg's cross-examination.

A. Limitations on Cross-Examination

1. Agent Barnette

[1] Shortly after Appellants were arrested, Agent Keith Barnette was arrested and charged by Alabama authorities with vehicular homicide committed while on duty.[6] At trial, Appellants sought to question Barnette regarding the arrest and discrepancies between his testimony and his rough notes, prepared one week after the arrest. Appellants proffered that they would impeach Barnette by showing that he had changed his testimony as a result of the arrest in the hopes of receiving leniency in his pending criminal case and/or assistance in any civil actions against him. However, the government filed a motion in limine to prevent defense counsel from examining Barnette concerning the vehicular homicide action. In granting the government's motion, the district court held that so long as Barnette's testimony was consistent with his rough notes, which had previously been turned over to Appellants, Appellants could not question Barnette about the accident or pending action against him.

On direct examination, Barnette testified that Diaz had spoken to him regarding the "count" on the cocaine and had used a calculator to add the cocaine packages. On cross-examination, Barnette admitted that his notes did not reflect the conversation or Diaz's use of a calculator. Appellants then asked Barnette whether there had "been new developments in your life that might cause you to

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[6] At the time that Barnette testified, he performed only administrative duties pending the results of an internal affairs investigation. A civil action was also instituted against him.

want to curry favor with the United States Government prosecutors and customs agents and other law enforcement agents in this case." Barnette answered in the negative. Asked the same question a second time by the court, Barnette again denied having any reason to "curry favor." Appellants then moved to pursue further this line of questioning, which was denied.

Appellants next asked whether Barnette was under investigation by the Internal Affairs of the Customs Service and no longer on active duty. The court sustained the government's objections before Barnette answered either question. However, Barnette did answer "yes" in response to Appellants' question if he would lose his job if he committed perjury. On redirect, Barnette testified that the day after Appellants' arrest and prior to creating his notes, he told the U.S. Attorney's Office about the conversation with Diaz and about Diaz's use of a calculator. After the government concluded its case-in-chief, defense counsel recalled the witness and attempted to establish its proffer. As before, Barnette denied being biased or motivated on behalf of the government. Consequently, the court maintained its prior ruling prohibiting examination into the
vehicular homicide action. On appeal, Appellants claim that restricting Barnette's cross-examination was error. We disagree.

[2-4] Although the district court possesses discretionary power to rule on the admissibility of evidence, *United States v. Garcia*, 13 F.3d 1464, 1468 (11th Cir.), *cert. denied*, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1994), its discretion in limiting the scope of cross-examination is subject to the requirements of the Sixth Amendment. *Id: United States v. Lankford,* 955

F.2d 1545, 1548 (11th Cir. 1992).[7] The right to cross-examine is not unlimited, however, because once there is sufficient cross-examination to satisfy the Confrontation Clause, further questioning is within the district court's discretion. *United States v. Taylor*, 17 F.3d 333, 340-41 (11th Cir. 1994). "The test for the Confrontation Clause is whether a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." *Id.* (quoting *Garcia*, 13 F.3d at 1469).

[5] Appellants wished to question Barnette about the state court indictment, hypothesizing that it gave him motive to testify favorably for the government in the hopes that he would receive leniency or assistance as to the homicide action. Appellants rely on *Greene v. Wainwright*, 634 F.2d 272, 275-76 (5th Cir. 1981) for the proposition that because they were attempting to show bias on the part of a prosecution witness, Barnette, the limitation on cross-examination was unconstitutional. Nonetheless, the mere fact that Appellants sought to explore bias on the part of a prosecution witness does not automatically void the court's ability to limit cross-examination. It is axiomatic that the right to cross-examination is not absolute because "the information sought to be elicited must be relevant." *Haber v. Wainwright*, 756 F.2d 1520, 1522 (11th Cir. 1985).

Here, Barnette's testimony was consistent with statements given prior to both the creation of his notes and his arrest. Barnette's testimony simply parroted statements made at a time when he had no special incentive to seek the government's help. Because of the highly prejudicial

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[7] The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const., sixth amend.

nature of the arrest, the court properly handled the cross-examination by limiting inquiry into the accident as long as Barnette's testimony did not deviate from his notes and prior statements. The fact that his testimony was entirely consistent with these prior statements demonstrates that Barnette was not shading his testimony in an effort to gain leniency on his state court case. Moreover, we note that there is no evidence in the record showing that the government had the ability to grant leniency in Barnette's Alabama action.[8] In light of these circumstances, we fail to see how the limitation on cross-examination constituted an abuse of discretion or violated the Sixth Amendment. *See United States v. Thorn*, 917 F.2d 170, 176 (5th Cir. 1990) (barring defendant from exploring government witness' state law indictment did not violate Sixth Amendment as there was no evidence the government could influence the state court proceedings, and the existence of a pending state court indictment on charges totally unrelated to the testimony offered in the case did not give the witness a substantial reason to cooperate with the government). Finally, Appellants were able to delve into Barnette's credibility, albeit in a limited fashion, by inquiring if he had any reason to "curry favor" with the government. Thus, the district court did not abuse its discretion by limiting Appellants' cross-examination of Barnette.

2. Informant Ellis McKenzie

At trial, the government declined to call McKenzie as

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[8] Appellants' reliance on *Lankford* is misplaced inasmuch as *Lankford* involved a witness' possible motive to cooperate with the government in order to (1) "protect his sons," (2) "obtain general assistance in avoiding a subsequent federal prosecution against them," and (3) "solicit help [from the] federal government in his sons' state case." 955 F.2d at 1549. The facts in this case are substantially different.

a witness. Instead, Appellants introduced McKenzie's testimony via a pre-trial deposition. Appellants planned to use the deposition to show that Winberg lied in stating that he had not intervened and assisted McKenzie when McKenzie was detained for possession of crack cocaine in New Orleans. Additionally, Appellants sought to demonstrate that McKenzie might be biased in favor of the government to prevent criminal charges being brought concerning the New Orleans crack incident. The district court refused to allow Appellants to introduce the entire deposition, allowing only those portions that it deemed relevant for impeachment purposes. Thus, Appellants were prohibited from introducing McKenzie's testimony about his detention in New Orleans. However, the court did permit Appellants to introduce portions of the transcript in which McKenzie admitted being a paid government informant. Appellants claim that the court's limitation violated their Sixth Amendment confrontation rights and constituted reversible error. We disagree.

[6] The court did not err by refusing to allow Appellants to enter either those portions of McKenzie's deposition involving the New Orleans incident or the deposition *in toto*. *See United States v. Thompson*, 976 F.2d 666, 671 (11th Cir. 1992)(introduction of complete medical records unwarranted where they were not as a whole probative of witness' credibility; only those portions inconsistent with witness' trial testimony were probative and could be used for impeachment), *cert. denied*,--- U.S. ---, 113 S.Ct. 3010, 125 L.Ed.2d 701 (1993). Furthermore, a review of the record demonstrates no significant inconsistencies between Winberg's and McKenzie's descriptions of the New Orleans crack incident. Accordingly, the district court did not err in limiting the impeachment uses of McKenzie's deposition.

[7,8] We find that Appellants' Sixth Amendment claims similarly lack substance. Although Appellants

wanted to probe deeply into McKenzie's background, the Sixth Amendment is satisfied where sufficient information is elicited to allow the jury to gauge adequately a witness' credibility and to assess his motives or possible bias. *United States v. Burke*, 738 F.2d 1225, 1227-8 (11th Cir. 1984) (sufficient information elicited where jury knows a witness has been granted immunity, participated in the witness protection program, and received money from the government). For example, in *United States v. Kopituk*, we held that a court does not abuse its discretion by limiting cross-examination of the government's "most vital" witness where the jury knows that the witness has an agreement with the government to testify in exchange for a lenient plea arrangement on pending charges. 690 F.2d 1289, 1337 (11th Cir. 1982), *cert. denied*, 461 U.S. 928, 103 S.Ct. 2089, 2090, 77 L.Ed.2d 300 (1983).

Here, analogous information was presented to the jury. McKenzie, who can in no way be termed a "vital witness," admitted that he was a government informant, that he had been paid money in the past, and that he had received $12,000 in this case. He also testified that he had received $2,000 the day before his deposition and that he spent time preparing for his deposition in the company of Agents Kyle Barnette and Dwight McDaniel. The jury also knew that McKenzie stood to receive $250,000, representing the maximum award allowed to informants. Finally, the jury was aware that whether McKenzie actually received the $250,000 would be determined by Winberg's superiors. Under these circumstances, no further bias would have been exposed by investigation into McKenzie's character of the events surrounding his New Orleans detention. *United States v. Alonso*, 740 F.2d 862, 874 (11th Cir. 1984)(court properly prohibited inquiry into facts concerning witness' arrest; defendants were allowed to ask if witness made a deal with government or expected a benefit for testifying), *cert. denied*, 469 U.S. 1166, 105

S.Ct. 928, 83 L.Ed.2d 939 (1985).[9]

B. Racial Comments

[9] Appellants claim that the prosecutor impermissibly injected race into the case during the redirect of Schell wherein the following exchange occurred:

> PROSECUTOR: You responded to some questions related to pressure from Mr. Schwartz and Mr. Marino about money that was owed, do you recall those questions?
> SCHELL: Yes.
> PROSECUTOR: What type of pressure, if any, was applied to you for collection for money?
>
> SCHELL: Mr. Marino, not Mr. Schwartz. He had told me that I couldn't control Struder and that the only way to control him was to take a bat to him. He used other words but that was the jist [sic] of it.
> DEFENSE COUNSEL: I object to the conclusion of remarks as to what he considers the jist [sic] of something said to him and ask that last statement be stricken.
> THE COURT: I am not sure I understand your last answer, without giving any undue....
> SCHELL: Okay. Struder--he told me that he wanted to go to Struder's house and that *the only way to control a nigger was to beat him with a bat.*

---

[9] Given the overwhelming evidence presented against each appellant, even if we were to conclude that McKenzie's cross-examination had erroneously been limited, the error would have been harmless. *See Grizzell v. Wainwright*, 692 F.2d 722, 726 (11th Cir. 1982) (no "reasonable probability" that verdict was affected by the error), *cert. denied*, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983).

THE COURT: Overrule your objection.
PROSECUTOR: Were those Mr. Marino's exact words?
SCHELL: Yes.
PROSECUTOR: *Is Mr. Struder a black man?*
DEFENSE COUNSEL: Judge, I object. That is absolutely immaterial and irrelevant in regard to this.
THE COURT: Overruled.

(emphasis supplied).

Schell did not answer the prosecutor's question as the prosecutor immediately moved onto other points. At a bench conference following this examination, Appellants moved for a mistrial, alleging that the government was attempting to inflame the black jurors against the white Appellants. The district court denied the motion. Appellants declined the court's offer to give a curative instruction.

While this Court is ever-vigilant regarding the improper injection of race into criminal trials, the prosecutor's statements do not constitute an improper appeal to race. Thus, we do not believe that a mistrial was warranted. *See Willis v. Kemp*, 838 F.2d 1510, 1522-23 (11th Cir. 1988)(although improper, prosecutor's question of black defendant as to whether he referred to his white victim as a "honkey" was not grounds for granting a mistrial), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989); *United States v. Krohn*, 573 F.2d 1382, 1389 (10th Cir.) (government's eliciting from a witness that one of two white defendants on trial for mail fraud had referred to a victim of their scheme as a "poor black bastard" was not an appeal to racial prejudice), *cert. denied*, 436 U.S. 949, 98 S.Ct. 2857, 56 L.Ed.2d 792 (1978). *See also united States v. Hernandez*, 865 F.2d 925, 927-28 (7th Cir. 1989)(prosecutor's

improper closing remark to "send clear message to Cuban drug dealers was not so inflammatory as to prejudice Cuban defendant).

C. Strike of Venireperson

At trial, the prosecutor exercised peremptory strikes to remove three black persons from the jury. Appellants assert that one of these challenges, that of venireperson Portis, violated the Constitution's equal protection guarantee because it was racially motivated. *See Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Without finding that Appellants had established a prima facie case of discrimination, the district court asked the prosecutor to articulate the reasons underpinning the strikes. The prosecutor responded that she struck Portis because (1) she believed that Portis may have been related to a defendant whom she had formerly prosecuted and (2) Portis was generally inattentive during the voir dire, focusing on the defense table during jury selection. The court upheld the strike of Portis.

[10-12] We give great deference to a district court's finding that the government rebutted a prima facie case of discriminatory jury selection and reverse only if that finding is clearly erroneous. *United States v. Cure*, 996 F.2d 1136, 1138 (11th Cir.1993), *cert denied*, ___ U.S. ___, 114 S.Ct. 1075, 127 L.Ed.2d 393 (1994). Given that the court asked the prosecutor to explain her strikes of the black venirepersons, we shall assume that Appellants met the requirements of a prima facie case and therefore proceed directly to determining whether the prosecutor's reasons for striking Portis were race-neutral. The prosecutor's belief that the venireperson may have been related to a defendant in an earlier case did not justify the challenge. The record suggests that the venireperson was unrelated to that defendant as Portis did not affirmatively

respond to the court's inquiry to the venire whether any family member had ever been involved in a criminal matter in court. Nonetheless, a venireperson's inability to pay attention is a proper race-neutral reason for using a peremptory strike. *See United States v. Hendrieth*, 922 F.2d 748, 749-50 (11th Cir. 1991)(per curiam)(upholding trial court's decision to allow a strike based upon a juror's inattentiveness and her rolling and rubbing her eyes during voir dire).

[13] Explanations based upon a juror's demeanor are, however, difficult to confirm on appeal because the transcripts that comprise the record before the Court do not portray the unacceptable behavior. Moreover, such explanations are particularly susceptible to the kind of abuse prohibited by *Batson* . Consequently, to allow meaningful appellate review, trial judges should fully develop the record regarding the specific behavior by a venireperson that leads to a peremptory strike and should verify that the stricken venireperson's conduct was conspicuously different from that of the other venirepersons. *See United States v. Cooper*, 19 F.3d 1154, 1161 (7th Cir.1994) (upholding demeanor-based strikes in part because trial judge noted on record that, based on his own observations, the prosecutor's interpretations were reasonable); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U.MICH J.L.REF. 229, 246-50, 266-67 (1993) (arguing that courts should reject demeanor-based explanations that cannot be confirmed by the record).

[14] In this case, Appellants do not dispute that Portis directed her attention toward the defendants, away from the prosecution, during jury selection, allowing us to infer that Portis' behavior was different from the other venirepersons. *Cf. Cure,* 996 F.2d at 1138-39 (defense counsel's failure to offer contrary description of venireperson's demeanor militates against reversal).

Accordingly, the district court did not clearly err by finding that the prosecutor offered a race-neutral reason for striking Portis from the jury.

D. Robert Fowler's Post-Arrest Statement

Following the receipt of his *Miranda* rights at the barn, Fowler was asked if he wanted to waive his rights. He responded by shaking his head. He was then taken to jail. Some four hours after his arrival, agents brought him to an interview room where Agent McDaniel told Fowler the charges against him and that he would be tried in Alabama. Agent McDaniel then asked other agents present in the interview room if Fowler had been "Mirandized." Thinking that Fowler might not understand the term "Mirandized," McDaniel notified Fowler that he had a right to an attorney and a right not to speak to the agents. Fowler acknowledged that he was aware of his *Miranda* rights. McDaniel then asked him if he wished to cooperate. At trial, McDaniel testified that Fowler responded by saying that he could not cooperate, he did not know anything or anybody, he was paid to be "blank," and he was simply a chauffeur driving someone from Miami. McDaniel further testified that when he questioned Fowler about $500 that Fowler possessed when arrested, Fowler stated that he would rather not say who paid him and that he was sorry he had gotten greedy. Fowler then asked for an attorney and questioning ceased. The court denied Fowler's motion to suppress these statement.

[15] On appeal, Fowler contends that the denial of his suppression motion was error because he had unequivocally invoked his *Miranda* rights. Assuming, without deciding, that Fowler is correct, the taking of his statements in contravention of *Miranda* is subject to the harmless error analysis. *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir.), *cert. denied*, --- U.S. ---, 112 S.ct.

100, 116, L.Ed.2d 71 (1991); *United States v. Pena*, 897 F.2d 1075, 1082 (11th Cir. 1990). Our inquiry is two-fold. First, we examine the effect the erroneously admitted statement had upon other evidence introduced at trial and upon the conduct of the defense. *Beale*, 921 F.2d at 1435. Second, if, absent the illegal statement, the remaining evidence is so overwhelming to establish guilt beyond a reasonable doubt, admission of the statement is harmless. *Id.*

[16] At trial, Agent Tanner testified that Schwartz told him that a Nissan automobile with a secret compartment in its underbelly capable of storing sixty kilograms of cocaine would be one of the vehicles used to load and transport the drugs. The government introduced photographs showing the Nissan's secret compartment at trial. It is uncontroverted that Fowler was present at the barn and that he spent much time there under the Nissan. Agents Lamplaugh, Tanner, and Keith Barnette testified that at the barn Fowler expressly told them that he was attempting to open the Nissan's hidden compartment. Agents Lamplaugh and Tanner also testified that they overheard Fowler telling other appellants that he needed tools and a flashlight to open the compartment.
Additionally, Agent Lamplaugh testified that Fowler told him that the compartment held sixty kilograms of cocaine. Given the overwhelming strength of this evidence, we conclude that the admission of Fowler's post-arrest statements was harmless error.

E. Sentencing Issues

1. Ex Post Facto Violation

[17] To avoid ex post facto problems, we have held that a defendant is to be sentenced under the Guidelines and commentary in effect on the date of sentencing unless a more lenient punishment would occur

under the Guidelines' version in effect on the date the offense was committed. *United States v. Wilson*, 993 F.2d 214, 216 (11th Cir.1993). Furthermore, Guideline commentary is authoritative unless its interpretation violates the law or is an erroneous reading of the Guidelines. *Stinson v. United States*, --- U.S. ---, ---, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993).

[18] Ruiz claims that an ex post facto violation occurred when the district court refused to give him an acceptance of responsibility reduction based on commentary that took effect *after* he was convicted but *before* he was sentenced. Although "application of an intervening Guideline interpretation by commentary promulgated after the offense could run afoul of the Ex Post Facto Clause," *United States v. Carroll*, 6 F.3d 735, 746 n.9 (11th Cir.1993), *cert. denied*, --- U.S. ---, 114 S.Ct. 1234, 127 L.Ed.2d 577 (1994), we are not confronted with such a situation. Where, as here, the amendments do not overrule prior construction but instead serve to confirm our reading of the Guideline section, ex post factor concerns are not implicated. *Id.*

[19] Prior to Ruiz's sentencing, the Guidelines stated:

> Conviction by trial does not preclude a defendant from consideration [for receiving an acceptance of responsibility reduction.] A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

U.S.S.G. §3E1.1 comment. (n.2) (Nov. 1989).

The revised commentary that the court applied at sentencing provides that the acceptance of responsibility reduction

> is not intended to apply to a defendant who puts the government to the burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

U.S.S.G. §3E1.1 comment. (n.2) (Nov. 1990). The district court's application of the sentencing Guidelines is subject to *de novo* review. *United States v. Rodriguez*, 959 F.2d 193, 195 (11th Cir.), *cert. denied*, ---U.S.---, 113 S.Ct. 649, 121 L.Ed.2d 563 (1992).

[20] We have previously held that entry of a not guilty plea and insistence upon a trial are factors that may be considered in determining whether a defendant has accepted responsibility for his crime. *United States v. Castillo-Valencia*, 917 F.2d 494, 501 (11th Cir. 1990) (holding that decision to go to trial may not be used to

bar categorically an acceptance of responsibility reduction), *cert. denied,* 499 U.S. 925, 111 S.Ct. 1321, 113 L.Ed.2d 253 (1991). Moreover, we have also recognized that a defendant who exercised his right to trial may diminish his chance of being granted the acceptance of responsibility reduction as there is less evidence of acceptance to weigh in his favor. *Rodriguez,* 959 F.2d at 197. Thus, the revised commentary relied on by the district court does not overrule §3E1.1 but instead accords with our reading of the section. In such cases, the Ex Post Facto Clause is not implicated. Thus, this claim fails. *Cf. Carroll,* 6 F.3d at 746 n. 9 (no ex post facto concerns where Guideline amendment regarding definition of a drug does not overrule prior constructions of the Guideline but instead confirms our reading of the Guideline).

2. Eighth Amendment

[21] Schwartz claims that his life sentence violates the Eighth Amendment. According to Schwartz, the district court erred by mechanically applying the guidelines and failing to appreciate that Schwartz did not possess the intent or the ability to purchase the cocaine, and that he could not have distributed it in any event as it was government owed and controlled. Schwartz thus asserts that his sentence is so unjust and harsh as to violate the Eighth Amendment. We reject Schwartz's claim. A review of the record indicates that the court sentenced each Appellant individually. Moreover, even assuming that the court failed to make individualized findings, the sentence may nonetheless be upheld where, as here, the record supports the amount of drugs attributed to the defendant. *United States v. Ismond*, 993 F.2d 1498, 1499 (11th Cir. 1993). Because the amount of drugs attributed to Schwartz was proper, his life sentence is neither cruel nor unusual. *See United States v. Willis*, 956 F.2d 248, 251 (11th Cir. 1992) (Guidelines do no violate Eighth Amendment).

III. CONCLUSION

Appellants' sentences and convictions are AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by United States Mail to the Office of the Solicitor General, Washington, D.C.; Gloria Bedwell, Assistant United States Attorney, 169 Dauphin Street, Mobile, Alabama 36602, and to counsel listed below, this 24 day of February, 1995.

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No. 94-1439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CONOPCO, INC. D/B/A
CHESEBROUGH-POND'S USA CO.,

Petitioner,

vs.

MAY DEPARTMENT STORES COMPANY, VENTURE STORES, INC., THE BENJAMIN ANSEHL COMPANY, and KESSLER CONTAINERS, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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23 pp

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October Term, 1994

CONOPCO, INC. D/B/A CHESEBROUGH-POND'S USA CO.,

Petitioner,

—v.—

MAY DEPARTMENT STORES COMPANY, VENTURE STORES, INC., THE BENJAMIN ANSEHL COMPANY, and KESSLER CONTAINERS, LTD.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, American Home Products Corporation ("AHP") and Nabisco, Inc. ("Nabisco") hereby respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner Conopco, Inc.'s Petition For a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in this case.

On March 27, 1995, AHP and Nabisco sought the consent by telephone of the petitioner and respondents for the filing of this brief *amicus curiae* in support of the petitioner. The petitioner consented in writing. All four

respondents refused consent by telephone on March 27, 1995, thereby necessitating this motion.

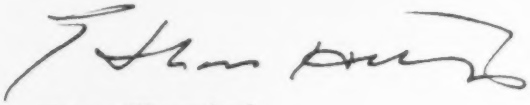
Both AHP and Nabisco manufacture and sell consumer products under some of America's best known brand names. AHP, a worldwide leader in health care products, manufactures and sells leading brands such as ADVIL ibuprofen analgesic, ROBITUSSIN cough medications and CENTRUM vitamins. Nabisco manufactures and sells cookies, crackers, and other food products under brand names such as OREO, FIG NEWTON, SNACKWELL'S and RITZ. All of these products are leaders in their product categories, and all of them have long been sold in packages whose designs are well known and easily recognizable to consumers. Indeed, the package designs for the companies' leading brands may be just as important, if not more important, than the word trademarks in establishing a brand identity.

Accordingly, both Nabisco and AHP have a long standing interest in enforcing federal law which protects distinctive package designs from infringement. They are therefore concerned by the decision of the Federal Circuit in this case, which represents an abrupt departure from the settled law of most circuits in several respects. AHP and Nabisco believe that the decision creates an opportunity for retailers or private label manufacturers to confuse the public by selling products which compete directly with their leading brands, in virtually identical trade dress, and to escape liability by simply affixing some indication of origin with the retailer. This would damage not only the commercial interests of AHP and Nabisco, but the public interest as well.

This brief *amicus curiae*, for which AHP and Nabisco are requesting permission to file, will further amplify the discussion regarding the law of trade dress, and address the Federal Circuit's departure from established rules of law.

For the foregoing reasons, AHP and Nabisco respectfully move for leave to file the attached brief *amicus curiae*.

Respectfully submitted,



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March 29, 1995

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American Home Products Corporation ("AHP") and Nabisco, Inc. ("Nabisco") respectfully submit this brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit ("Petition for a Writ of Certiorari") filed by Petitioner, Conopco, Inc. d/b/a Chesebrough-Pond's USA Co. ("Conopco") in *Conopco, Inc. v. May Dep't Stores Co.*, __ F.3d __, 32 U.S.P.Q.2d 1225 (Fed. Cir. 1994).

The decision of the Federal Circuit holds that a private label retailer who has intentionally copied the trade dress of a leading brand may escape liability merely by affixing its retail logo (not its store name) on the front of its package. This decision contravenes established law, jeopardizes the ability of companies like AHP and Nabisco to protect the trade dress of their famous brands, and will lead to increased confusion and deception among consumers.

INTEREST OF THE *AMICUS CURIAE*

AHP manufactures and sells leading brands of over-the-counter health care products such as ADVIL analgesic, ROBITUSSIN cough medication and CENTRUM vitamins. Nabisco manufactures and sells leading brands of cookies and crackers under brand names like OREO, SNACKWELL'S and RITZ. All of these brands are sold in packages that are extremely well recognized by consumers. Indeed, it is fair to say that in a typical drug store or supermarket environment, a consumer is likely to be attracted to the array of green and white ROBITUSSIN packages, or the familiar RITZ cracker box design, before he or she even sees the brand name on the package.

Retail chains frequently dress their competing private label products in packages which echo, in some respect, the packages of leading brands. Until the Federal Circuit decision in this case, suits concerning this practice were decided on traditional principles of unfair competition law.

The Federal Circuit decision, however, imports a *per se* exception to these principles, radically altering the legal balance between national brand and private label producers.

In every Circuit, the question of trade dress infringement is determined by weighing a set of factors enumerated in the case law. In this case, the District Court found that Conopco prevailed on all of them. Included in its analysis was a finding that respondents had intentionally copied Conopco's strong, nonfunctional and protectible trade dress. The Federal Circuit left the District Court's findings on these facts virtually undisturbed, yet reversed. If Conopco cannot protect its trade dress from infringement in a case like this, it is difficult to imagine one in which it -- or any other national brand manufacturer -- could do so.

AHP and Nabisco therefore are greatly concerned that the decision will create an "open season" on their valuable national brand trade dress. At the very least, the decision departs from the established law of this Court and the various Circuits, and renders uncertain the parties' ability to enforce their trade dress rights.

SUMMARY OF ARGUMENT

The Federal Circuit decision should be reversed because, in addition to the reasons set forth in the Petition for a Writ of Certiorari:

1. It fails to recognize trade dress as a form of intellectual property equal in legal and commercial importance to trademarks. This is inconsistent with this Court's decision in *Two Pesos, Inc. v. Taco Cabana, Inc.*, ___ U.S. ___, 112 S. Ct. 2753, 120 L. Ed. 2d 615, *reh'g denied*, ___ U.S. ___, 113 S. Ct. 20, 120 L. Ed. 2d 947 (1992), which holds that trade dress should be treated no differently than trademarks. This is also inconsistent with modern commercial practice, in which the overall design and appearance of a package plays an equal -- if not greater --

role than the trademark in establishing a brand identity in the minds of consumers.

2. It fails to take a sufficiently inclusive view of the types of confusion which may support an infringement claim. It is infringement if a defendant initially attracts potential purchasers by using a similar mark or trade dress, riding the coattails of the senior user's reputation and recognition, even if that confusion is dissipated at the time of purchase. The Federal Circuit's narrow view of what constitutes actionable confusion is both legally erroneous and commercially devastating to companies like AHP and Nabisco, whose leading brands are targets for "knockoffs" by private labellers.

ARGUMENT

I. THE FEDERAL CIRCUIT DECISION IS INCONSISTENT WITH THIS COURT'S DECISION IN *TWO PESOS*

The Federal Circuit decision should be reviewed because it assumes, without evidence, that confusion created by virtually identical *trade dress* on a low-cost retail store item can be dissipated simply by the use of a retailer's own *trademark*. This relegates the source - identifying power of trade dress to a form of second-class citizenship, contravening this Court's decision in *Two Pesos, Inc. v. Taco Cabana, Inc.*, ___ U.S. ___, 112 S. Ct. 2753, 120 L. Ed. 2d 615, *reh'g denied*, ___ U.S. ___, 113 S. Ct. 20, 120 L. Ed. 2d 947 (1992).

In *Two Pesos*, the question presented was whether the trade dress of a restaurant could be protected under Section 43(a)[1] without proof that the trade dress had acquired

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[1] 15 U.S.C. § 1125(a).

secondary meaning.[2] The law was clear that inherently distinctive word trademarks were protectible without such proof, yet some Circuits had required proof of secondary meaning in all trade dress cases, irrespective of the inherent distinctiveness of the trade dress. This Court rightly held that there was no reason to judge the protectibility of trademarks and trade dress under different standards:

> [P]rotection of trademarks and trade dress under § 43(a) serves the same statutory purpose of preventing deception and unfair competition. There is no persuasive reason to apply different analysis to the two.

___ U.S. at ___, 112 S. Ct. at 2760, 120 L. Ed. 2d at 627. Such a difference in treatment was not only unsupported by the text of § 43(a), said this Court; it also undermined the purpose of the Lanham Act:

> Protection of trade dress, *no less than of trademarks*, serves the Act's purpose to "secure to the owner of the mark the good-will of his business and to protect the ability of consumers to distinguish among competing producers."

___ U.S. at ___, 112 S. Ct. at 2760, 120 L. Ed. 2d at 627 (emphasis supplied) (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 198, 105 S. Ct. 658, 663, 83 L. Ed. 2d 582, 590 (1985)).

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[2] Secondary meaning is said to exist when a trademark or trade dress "has come *through use* to be uniquely associated with a specific source:" (emphasis added). Restatement (Third) of Unfair Competition § 13, comment e (Tent. Draft No. 2, 1990), quoted in *Two Pesos*, ___U.S. ___, 112 S. Ct. 2754, 120 L. Ed. 2d at 622, n.4.

This Court's recognition of the *legal* importance of trade dress jibes with the market's recognition of its *commercial* importance. It is a marketing truism that three-quarters of buying decisions are made at the point of purchase, where the consumer is facing the producer's package.[3] These decisions are made quickly, and in a crowded environment; the average supermarket shopper views twenty products *per second*.[4] It is for these reasons that national-brand producers like AHP and Nabisco invest millions of dollars in creating and developing package designs which will communicate a brand identity in a memorable way.

The right to protect this investment by preventing the use of confusingly similar packaging for competing goods -- even though defendant includes its own trademark -- is well established.[5] Indeed, the right to protection of trade dress

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[3] Michael Prone, "Package Design has Stronger ROI Potential Then Many Believe," *Marketing News*, October 11, 1993, p. 13.

[4] Eliot Schreiber, "Retail Trends Shorten Life of Package Design," *Marketing News*, December 5, 1994, p. 7.

[5] *See, e.g., AmBrit, Inc. v. Kraft, Inc.*, 805 F.2d 974 (11th Cir. 1986), re-reported, 812 F.2d 1531 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041, 107 S. Ct. 1983, 95 L. Ed. 2d 822 (1987) (KLONDIKE ice cream bar wrapper infringed by similar wrapper for competing POLAR B'AR product); *RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058 (2d Cir. 1979) (label for HAWAIIAN PUNCH soft drink consisting of blue background and tall glass of red punch infringed by similar label for WHITE ROCK soft drink); *Kraft General Foods, Inc. v. Friendship Dairies, Inc.*, 19 U.S.P.Q.2d 1691 (S.D.N.Y. 1991) (trade dress for BREAKSTONE'S sour cream infringed by package bearing well-known FRIENDSHIP mark); *Nabisco Brands, Inc. v. Conusa Corp.*, 722 F. Supp. 1287 (M.D.N.C. 1989), *aff'd without opinion*, 892 F.2d 74 (4th Cir. 1989) (hard candies virtually identical in appearance to LIFE SAVERS candies; defendant's affixation of its trademark BARCA to each piece did not prevent confusion; *Knorr-Nahmittel A.G. v. Reese Finer Foods, Inc.*, 695 F. Supp. 787 (D.N.J. 1988) (KNORR dried soup package design infringed by design for competing REESE soups); *Soft Sheen Products, Inc. v. Revlon, Inc.*, 675 F. Supp. 408

(continued...)

would be useless if defendant's mere affixation of its trademark created a complete defense, as the Second Circuit noted in *W.E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 662 (2d Cir. 1970):

> [I]f accepted, [this argument] would allow any company that is well-enough known, to infringe a competing company's mark, especially if the competitor is small, merely by coupling its own name with the competitor's mark. (citations omitted)

Case law does recognize some circumstances under which a defendant's prominent use of a very well-known trademark may obviate confusion. For example, in *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033 (2d Cir. 1992), defendant was found to have intentionally copied the trade dress of plaintiff's EXCEDRIN PM pain reliever in creating the package for its competing TYLENOL PM product. Nevertheless, because defendant's trademark was so well known, and because the respective marks on each package were "by far the *most prominent feature* . . . of *otherwise ordinary boxes*," the Court of Appeals found no likelihood of confusion. *Id.* at 1046 (emphasis added). However, the Court stressed that its decision was limited to the facts of the case before it:

> We do not mean to intimate that the distinctive elements of any trade dress may be

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[5](...continued)
(N.D. Ill. 1987) (trade dress for plaintiff's SOFT SHEEN hair care product infringed by similar design for Revlon's competing CREME OF NATURE product). *See also* "private label" cases cited in the Petition for Writ of Certiorari, p. 12 n 9.

> freely appropriated as long as the junior user clearly identifies the source of the goods.

Id. at 1047. Other cases, involving relatively expensive items purchased after considerable thought and attention, have found defendant's use of its well-known house mark sufficient to obviate confusion. *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423 (Fed. Cir. 1984) (microwave ovens); *Fisher Stoves, Inc. v. All Nighter Stove Works, Inc.*, 626 F.2d 193 (1st Cir. 1980) (cast iron wood stoves); *Bose Corp. v. Linear Design Labs, Inc.*, 467 F.2d 304 (2d Cir. 1972) (high fidelity loudspeakers); *Sunbeam Corp. v. Equity Indus. Corp.*, 635 F. Supp. 625 (E.D. Va. 1986), *aff'd*, 811 F.2d 1505 (4th Cir. 1987) (food processors).

The Federal Circuit decision at issue here goes far beyond these cases. Here, the products are low-cost packaged goods purchased in retail store environments. The plaintiff's trade dress is strong and highly distinctive. Defendants intentionally copied this trade dress, and without reasonable explanation failed to include its VENTURE trademark on the front label for its product. (Ironically, the only word trademark on the front of defendants' package is plaintiff's).[6] Most egregiously, the Federal Circuit simply *assumed* that the presence of the Venture logo would, in itself, dissipate confusion, ignoring the District Court's detailed and voluminous findings of fact to the contrary.

The leap to this conclusion can only be the product of an unspoken assumption by the Federal Circuit that source identification is primarily a function of a national brand's trademark, with the trade dress playing merely a supporting role. This assumption has no basis in the case record, is

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[6] District Court Finding of Fact No. 137, reprinted in Petition for Writ of Certiorari, p. 57a.

contrary to marketplace reality, and conflicts with this Court's decision in *Two Pesos*.

II. THE FEDERAL CIRCUIT DECISION TOOK AN ERRONEOUSLY NARROW VIEW OF THE TYPE OF CONFUSION WHICH CAN SUPPORT A FINDING OF INFRINGEMENT

The Federal Circuit justified its reversal of the District Court's finding of infringement (despite reversing only one of the District Court's 168 findings of fact) by holding that

> in view of the prominent placement of the Venture logo on the front of the Venture product, the extensive exposure of consumers have had to that logo, and the extended period over which consumers have been able to distinguish the Venture and Conopco brands without any apparent confusion -- the findings made by the court do not support a conclusion that consumers associate the Venture brand with Conopco, rather than with Venture.[7]

Petition for a Writ of Certiorari, Appendix A, p. 23a. This reasoning takes an erroneously narrow view of the types of confusion which can support an infringement claim. By recognizing only confusion as to association, the Federal

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[7] The Federal Circuit's reliance on the lack of confusion between the original VICL and Venture products is misplaced and erroneous because prior to the re-launch of VICL, Conopco did not use a distinctive bottle style (both Conopco and Venture had used a bottle which was commonly used throughout the industry) and Venture prominently used the VENTURE word mark, in addition to its logo, on the front of its package. District Court Finding of Fact Nos. 12, 66, reprinted in Petition for Writ of Certiorari, pp. 33a, 44a.

Circuit incorrectly ignored the broad scope of protection afforded to trademarks and trade dress by the Lanham Act.

In 1962, Congress amended the infringement section of the Lanham Act[8] to eliminate the requirement that "purchasers" be deceived as to the "source or origin" of the goods. This amendment evidenced "a clear purpose [by Congress] to outlaw the use of trademarks which are likely to cause confusion, mistake, or deception of any kind, not merely of purchasers nor simply as to source of origin." *Syntex Lab., Inc. v. Norwich Pharmacal Co.*, 437 F.2d 566, 568 (2d Cir. 1971); *see also Koppers Co., Inc. v. Krupp-Koppers GmbH*, 517 F. Supp. 836, 843 (W.D. Pa. 1981) ("The amendment also shows such intent that the nature of the confusion should not be restricted to source of origin of goods or services. Thus, this Court infers that it must broadly define the nature of the forbidden confusion and the class of people whose confusion is forbidden.").

Thus, the courts now regularly recognize three different types of actionable confusion:

> where: (1) prospective purchasers believe that the senior user sponsored or otherwise approved of the junior user's trademark, *see Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir.1979); (2) potential consumers

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[8] Prior to the 1962 amendment, Section 32(1) read:

> Any person who shall, without the consent of the registrant-
>
> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive *purchasers as to the source of origin of such goods or service*. 15 U.S.C. § 1114(1)(a) (emphasis added). The 1962 amendment deleted the italicized language.

> initially are attracted to the junior user's mark by virtue of its similarity to the senior user's mark, even though these consumers are not actually confused at the time of purchase, *see Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331, 1342 (2d Cir.1975); and (3) customers are confused as to the source of the junior user's product when this product is observed in the post-sale context, *see Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir.1986).

Jordache Enters., Inc. v. Levi Strauss & Co., 841 F. Supp. 506, 514-15 (S.D.N.Y. 1993).

The situation in which consumers are initially attracted to the junior user's product due to its similarity to the senior user's product, but are not actually confused at the time of purchase, has been recognized as "subliminal confusion," that is, the "defendants' ability to gain a foothold in plaintiff's market by exploiting subliminal or conscious association with plaintiff's well-known name." *Playboy Enters., Inc. v. Chuckleberry Publishing, Inc.*, 486 F. Supp. 414, 428 (S.D.N.Y. 1980), *later proceeding*, 511 F. Supp. 486 (S.D.N.Y. 1981) (permanent injunction), *aff'd*, 687 F.2d 563 (2d Cir. 1982). By reversing the District Court on the ground that the facts did not support a finding of confusion as to association or source, the Federal Circuit failed to consider whether the facts support a finding of subliminal confusion.

Subliminal confusion is an insidious and subtle form of unfair competition.

> By triggering the positive associations generated by an established mark, a newcomer can obtain an unfair economic

> advantage in the form of a quick, unearned foothold in competition with a well-known trademarked product, in effect, turning the mark against itself. Without source confusion a new entrant is thus able to benefit from the investment made by the mark owner in establishing a unique identity among the purchasing public.

Steven H. Hartman, "Subliminal Confusion: The Misappropriation of Advertising Value," 78 *The Trademark Reporter* 506, 508 (1988).

The conduct of defendants who copy the salient features of a senior user's trade dress or trademark to gain initial consumer interest (a "foot in the door") has been repeatedly recognized as actionable.[9] As stated in *Kroger Co. v. Johnson & Johnson*, 570 F. Supp. 1055 (S.D. Ohio

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[9] *See, e.g., Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 260 (2d Cir. 1987) ("such initial trademark confusion works a sufficient trademark injury."); *Grotrian, Hellferich, Schulz*, 523 F.2d at 1342; *Stern's Miracle-Gro Prods., Inc. v. Shark Prods., Inc.*, 823 F. Supp. 1077, 1090 (S.D.N.Y. 1993) (trademarks laws are designed to protect against subconscious association "even if it can be dispelled by the consumer upon further investigation"); *Resorts Int'l v. Greate Bay Hotel and Casino*, 830 F. Supp. 826, 838 (D.N.J. 1992) (in addition to "mistake" and confusion as to source, there is a third, and perhaps most significant kind of confusion" -- subliminal confusion) (citations omitted); *Veryfine Prods., Inc. v. Colon Brothers, Inc.*, 799 F. Supp. 240, 251 (D.P.R. 1992) (finding all three forms of confusion existed); *Koppers Co., Inc.*, 517 F. Supp. at 844 ("Courts have increasingly come to recognize that damaging misassociation of commercial identities can occur at subliminal levels."); *Ortho Pharmaceutical Corp. v. American Cyanimid Co.*, 361 F. Supp. 1032, 1044 (D.N.J. 1973) ("The trade-mark laws protect against this kind of psychological confusion implanted by similar trademarks in the mind of a consumer.").

1983), which involved a store brand "equivalent" to the TYLENOL brand:[10]

> There is something inherently unfair in the effort by plaintiffs to avail themselves of the name and good will of Tylenol. Defendants have expended millions of dollars in advertising their product to the American public. To permit a bystander who has spent a minimum of time, money, and effort in developing its product to profit by marketing the identical commodity with the similar name and packaging is contrary to the stated Congressional purpose of the Lanham Act.

Id. at 1060.

By closely copying the trade dress of market leaders, private labels, such as Venture's lotion, essentially get a free ride on the time, effort and expense incurred by the market leader in developing a distinctive, unique trade dress for its product and promoting that distinctive trade dress as an indicator of source.[11] The private label product in its copycat packaging thus conjures up the market leader and becomes imbued with the reputation for high quality that the market leader has worked so hard to establish and the favorable association the market leader's package has come

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[10] In *Kroger*, the declaratory judgment plaintiffs marketed over-the-counter acetaminophen in competition with Johnson & Johnson's market leader TYLENOL brand acetaminophen. The plaintiffs' redesigned packaging was nearly identical to that used by Johnson & Johnson for TYLENOL, and included the use of trademarks ending in the suffix -NOL. *Id.* at 1056-57.

[11] Conopco spent two years developing the revised VICL trade dress and $106 million promoting and advertising the revised VICL. In contrast, it took defendants less than a year to copy the VICL redesigned trade dress. District Court Finding of Fact Nos. 21-25, 36, 50, 52, reprinted in Petition for Writ of Certiorari, pp. 35a-36a, 38a-39a, 40a, 42a.

to represent in consumers' minds as a consequence of product quality and consumer acceptance.[12] Thus, with comparably little effort and money, the private label is able to ride on the coattails of the market leader.[13]

There are many legitimate ways for a private label manufacturer to encourage consumers to "compare and save" to the market leader, such as advertising and shelf talkers, which do not create subliminal confusion. The Federal Circuit's decision now gives private label manufacturer's carte blanche to copy the market leader's valuable and well-known trade dress and trademarks, so long as the private label manufacturer includes its own logo.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Federal Circuit in the case styled *Conopco, Inc. v. May*

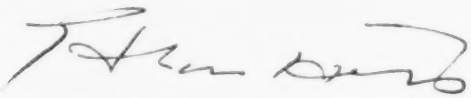
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[12] A recent study demonstrated clearly that extrinsic cues (packaging) effect the quality assessment of products by consumers significantly more than intrinsic cues (the product's actual ingredients). Paul S. Richardson, Alan S. Dick & Arun K. Jain, "Extrinsic and Intrinsic Cues Effects on Perceptions of Store Brand Quality," 58 *Journal of Marketing* 28 (Fall 1994).

[13] *See, Kroger Co.*, 570 F. Supp. at 1060 (referring to plaintiffs' blatant copying of the TYLENOL trade dress and mark as "reminiscent of the plight of the Little Red Hen whose friends declined to plant, harvest or thresh wheat; grind or bake the flour, but were all too ready to share with her the bread that resulted."); *McDonald's Corp. v. McBagel's, Inc.*, 649 F. Supp. 1268, 1270-71, 1278-79 (S.D.N.Y. 1986) (McDonald's advertising expenditures totalled $350 million annually compared to defendant's $10,000-$15,000 per year; defendant refused to change its name when objected to by McDonald's because of the free publicity defendant's store received due to the dispute); *see also Playboy Enters., Inc.*, 486 F. Supp. at 429 (evidence established that defendants would have had to expend approximately $2,000,000 to launch a magazine that could compete with PLAYBOY, but by using the mark PLAYMEN, defendants were able to launch their magazine and effectively compete with PLAYBOY for a mere $50,000).

Dep't Stores Co., ___ F.3d ___, 32 U.S.P.Q.2d 1225 (Fed. Cir. 1994).

Respectfully submitted,



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